NO. 48348-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

STEVEN RUSSELL,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Stephen Brown, Judge

BRIEF OF APPELLANT

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2. No rational jury could have found beyond a reasonable doubt that Mr. Russell intentionally assaulted Green.

> **ISSUE 1:** To convict Mr. Russell for Count I, the state was required to prove beyond a reasonable doubt that he intentionally assaulted Green. Did the state present insufficient evidence when the testimony showed, at most, that Mr. Russell accidentally brushed past Green while he was running somewhere else?

3. Mr. Russell was deprived of his Sixth and Fourteenth Amendment right to counsel.
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20. The cumulative effect of the prosecutor's misconduct requires reversal of Mr. Russell's convictions.

> **ISSUE 7:** The cumulative effect of repeated instances of prosecutorial misconduct can be "so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." Is reversal required where the prosecutor committed extensive misconduct, including: appealing to the jury's passion and prejudice, vouching for and bolstering the credibility of state witnesses based on "facts" not in evidence, and minimizing the state's burden of proof?

21. The Court of Appeals should decline to impose appellate costs, if Respondent substantially prevails and requests such costs.

> **ISSUE 8:** If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Russell is indigent?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Steven Russell's sister, Patricia Russell, was visiting his home for the evening with her boyfriend. RP 171.[1]

Ms. Russell and her boyfriend got into a heated argument in the back yard. RP 171. A neighbor heard the argument and called the police. RP 15-16.

When the police arrived, Ms. Russell and her boyfriend were back inside the house with Mr. Russell and his girlfriend, Laura Maldonado. RP 190-191.

When no one answered their knocking, the officers entered through the back door of the house. RP 37. They found the two women in the narrow laundry room and the two men in the adjoining kitchen. RP 38, 40.

Sergeant Jeff Salstrom felt that Maldonado was blocking his way into the kitchen. RP 87-88. Sergeant Salstrom took Maldonado down to the ground by her hair. RP 91, 174, 191; Ex. 10, 11.

Mr. Russell heard Maldonado screaming for help so he rushed into the laundry room. RP 222. On his way toward Salstrom and Maldonado,

[1] All citations to the Verbatim Report of Proceedings refer to the chronologically numbered volumes from 10/28/2015 and 10/29/2015.

he knocked Corporal Dale Green as he ran past him. RP 60. Green fell backwards. RP 60.

The state later charged Mr. Russell with assaulting both Green and Salstrom. CP 1-3.

At trial, the officers testified that they forced entry into the home because they heard screaming and a "thumping" noise from inside.[2] *See e.g.* RP 33.

The officers said that, once they were inside the house, all four occupants were uncooperative. RP 39, 88. They described the scene as very chaotic. RP 100, 134.

Green testified that Mr. Russell "knocked [him] back" as he ran past, toward Salstrom. RP 54. He said Mr. Russell was trying to get to Salstrom. RP 54.

Salstrom testified that Mr. Russell came at him with raised fists. RP 90. He said that Mr. Russell tried to punch him a few times, but that he was able to dodge the blows. RP 93-95.

All of the state's police witnesses testified at length about how difficult it was to arrest Mr. Russell following the alleged assaults. RP 46-47, 96-100, 128-130, 144-146, 149-158. They talked about having to tase him multiple times, punch him, and pepper spray him in the face to get

[2] The officers also testified that they heard someone yell "don't hit me." RP 78.

him to cooperate with being handcuffed. RP 46-47, 96-100, 128-130, 144-146, 149-158.

The prosecution called one police witness who hadn't even been present during the alleged assaults. RP 149-157. That officer only testified about how difficult it had been to arrest Mr. Russell afterwards. RP 149-157.

Mr. Russell's attorney did not object to any of the testimony about his arrest.

The officers also testified that they had seen red marks on Ms. Russell's neck and chest. RP 125, 163. The prosecution called another police witness who had not arrived until after the alleged assaults to testify about the marks. RP 159-166.

Again, defense counsel did not object.

Ms. Russell and Maldonado testified that the "thumping" noise the police had heard was coming from the washing machine, which was off-balance. RP 172, 198. Mr. Russell said he was completely surprised to see the police in the house and had no idea why they were there. RP 224.

The court agreed to instruct the jury on the lawful use of force based on the evidence that Mr. Russell had been coming to Maldonado's aid. RP 272.

Mr. Russell's defense attorney proposed the following instruction on the lawful use of force:

> A person may use, attempt to use force to resist an arrest by someone known by the person to be a police officer only if the person being arrested is in actual and imminent danger of serious injury from an officer's use of excessive force…
> CP 40.

The court combined the proposed instruction with a few others and instructed the jury on defense of others as follows:

> A person may use, attempt to use, or offer to use force to resist an arrest or aid another in resisting an arrest by someone known by the person to be a police officer only if the person being arrested is in actual and imminent danger of serious injury from an officer's use of excessive force…
> CP 50.

In closing, the prosecutor pointed out to the jury that the instruction on defense of others only applied to contexts in which someone was being arrested at the time of the alleged assault. RP 295.

The prosecutor also encouraged the jury to find the police officers more credible Mr. Russell because they would not "risk their careers, their badges, and their pensions" by going into Mr. Russell's house for no reason. RP 288. He also argued that the officers were more credible because they "go out there and risk their lives to defend people." RP 289.

The prosecutor told the jury that: "the police don't make this stuff up." RP 292.

The prosecutor described the state's burden of proof to the jury as follows:

> That's the definition of reasonable doubt, do you believe it. (sic) You have an abiding belief. Do you believe it now, you go back there and you talk about it, you come back here and announce your verdict and you still believe it.
> RP 293.

The prosecutor ended his initial argument by admonishing the jury to make Mr. Russell suffer the consequences of his alleged actions:

> [The officers] were threatened and they know that if there is a threat, they've got to get away. They have to. They have to, because if they don't, the consequences are real. And people that don't understand that think they can just fail to cooperate and obstruct and not (sic) tell the police to get the F out of their house and think they don't have to suffer the consequences. Well, folks, make him suffer the consequences, find him guilty.
> RP 298.

In rebuttal, the prosecutor argued that Mr. Russell should be happy that he was not injured more severely during his interaction with the police: "The defendant ought to be glad it's not the old days when all the cop has is a billy club and a gun." RP 314.

The jury found Mr. Russell guilty of both counts of assault. CP 52-53. This timely appeal follows. CP 71.

ARGUMENT

I. NO RATIONAL JURY COULD HAVE FOUND MR. RUSSELL GUILTY OF INTENTIONALLY ASSAULTING GREEN BEYOND A REASONABLE DOUBT.

The state's evidence showed that Mr. Russell brushed past Green as he was running toward Salstrom in the narrow laundry room. RP 54, 60. Mr. Russell was looking at Salstrom, not at Green, as he ran past. RP 54. Green did not know what part of Mr. Russell's body hit him. RP 44.

No rational jury could have found beyond a reasonable doubt that Mr. Russell intentionally assaulted Green.

A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found each element met beyond a reasonable doubt. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied*, 176 Wn.2d 1003, 297 P.3d 67 (2013).

In order to convict Mr. Russell in count I, the state was required to prove that he intentionally assaulted Green. RCW 9A.36.031.

But, even taking the evidence in the light most favorable to the state, the prosecution proved at most that Mr. Russell accidentally knocked Green over as he ran toward Salstrom. RP 44, 54, 60.

There was no evidence that Mr. Russell intended to assault Green, had any motive to assault Green, or was doing anything except trying to get quickly through a cramped space.

No rational jury could have found Mr. Russell guilty beyond a reasonable doubt of intentionally assaulting Green. Mr. Russell's conviction for Count I must be reversed. *Chouinard*, 169 Wn. App. at 899.

II. MR. RUSSELL'S DEFENSE ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY PROPOSING THE INCORRECT INSTRUCTION ON DEFENSE OF OTHERS AND FAILING TO OBJECT TO EXTENSIVE INADMISSIBLE EVIDENCE.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*[3]

Here, Mr. Russell's defense attorney provided ineffective assistance of counsel by proposing a jury instruction on defense of others

[3] Ineffective assistance raises an issue of constitutional magnitude that the court can consider for the first time on appeal. *Kyllo*, 166 Wn.2d at 862; RAP 2.5(a)(3).

that did not apply to Mr. Russell's case and by failing to object to extensive, highly-prejudicial, inadmissible evidence.

A. Defense counsel provided ineffective assistance by proposing an instruction on defense of others that was not applicable to Mr. Russell's case and, thereby, leaving the jury without instruction on a matter critical to the defense.

Mr. Russell ran past Green and toward Salstrom because Salstrom had taken Mr. Russell's girlfriend to the ground by her hair. RP 91, 174, 191; Ex. 10, 11.

Accordingly, the court instructed the jury that the state had the burden of proving that Mr. Russell had not used lawful force in defense of another. RP 272; CP 50.

But the court's instruction (which was an amalgam of instructions proposed by defense counsel) applied only to defense of others in the context of resisting an arrest. CP 40, 50.

As the prosecutor pointed out in closing, the court's instruction on defense of others was inapplicable to the facts of Mr. Russell's case because Maldonado was not being arrest when he came to her aid. RP 295.

Mr. Russell's defense attorney provided ineffective assistance of counsel by proposing the wrong instruction on the lawful use of force and,

thereby, leaving the jury without instruction on the legal concept critical to the defense.

A defense attorney provides ineffective assistance of counsel by proposing an erroneous jury instruction. *Kyllo*, 166 Wn.2d at 869.

The court's instructions must make the proper standard for lawful use of force manifestly apparent to the average juror. *State v. McCreven*, 170 Wn. App. 444, 462, 284 P.3d 378 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013); U.S. Const. Amend. XIV.

There can be no valid strategic reason for defense counsel to propose a jury instruction that relieves the state of its burden of proof. *Id.* (*quoting State v. Woods*, 138 Wn. App. 191, 201-02, 156 P.3d 309 (2007)).

Like in *Kyllo*, with proper research, Mr. Russell's defense attorney could have determined the correct legal standard for defense of others against the police in a non-arrest situation. *Kyllo*, 166 Wn.2d at 686-69. Indeed, the standard for defense of others against a police officer is the same, regardless of whether any party is being arrested at the time. *See State v. Ross*, 71 Wn. App. 837, 842-43, 863 P.2d 102 (1993).

Instead, defense counsel proposed an instruction that was inapplicable to his client's case. RP 40. The court's instruction told the

jury that defense of others was only permissible against a police officer if used "to resist arrest or aid another person in resisting arrest." CP 50.[4]

Defense counsel's performance fell below an objective standard of reasonableness. *Kyllo*, 166 Wn.2d at 686-69.

An accused person is prejudiced by his/her attorney's proposal of an improper jury instruction when the jury is left without instruction on the applicable law regarding a matter critical to the defense. *Id.* at 870.

There is a reasonable probability that defense counsel's failure to propose the correct jury instruction affected the outcome of Mr. Russell's trial. *Id.* 862.

The prosecutor was able to seize on the error to point out to the jury that its instruction on defense of others did not apply to Mr. Russell's case because no one was resisting arrest at the time of the alleged assaults. RP 295.

The jury was left with no legal mechanism to apply even if they believed that Mr. Russell had knocked Green down or "come after" Salstrom only in order to protect Maldonado from excessive force.[5]

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[4] The court's instruction on defense of others was created by combining several instructions that had been proposed by defense counsel. CP 50. Defense counsel did not object to the amalgamation or suggest any edits. RP 272-73.

[5] The case for defense of others was particularly strong as it applied to the allegation against Green. The jury could have believed that Mr. Russell intentionally knocked Green over, but that he had done so only while running to Maldonado's aid. The amount

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Mr. Russell's defense attorney provided ineffective assistance of counsel by proposing an inapplicable jury instruction on defense of others and failing to propose an instruction telling the jury that Mr. Russell's use for force was lawful if it was necessary to protect Maldonado from excessive force by the officers. *Kyllo*, 166 Wn.2d at 686-69. Mr. Russell's convictions must be reversed. *Id.*

B. Defense counsel provided ineffective assistance by failing to object to extensive inadmissible testimony alleging that Mr. Russell resisted his arrest after the alleged assaults for which he was charged and encouraging the jury to speculate that Mr. Russell had been involved in domestic violence.

Mr. Russell was not charged with resisting arrest. CP 1-3. Still, his attorney failed to object to extensive testimony about how uncooperative he was after the alleged assaults. RP 46-47, 96-100, 128-130, 144-146, 149-158.

Five different police witnesses testified that Mr. Russell had to be tased twice, punched, pepper sprayed in the face, and held down by multiple officers in order to be put in handcuffs. RP 46-47, 96-100, 128-130, 144-146, 149-158. One of those witnesses was not even present for the alleged assaults. RP 149-157. The prosecution called that witness

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of force used against Green would not have been more than what was necessary to reach Maldonado in the narrow quarters.

only to reiterate how difficult it had been to arrest Mr. Russell. RP 149-157.

Mr. Russell was also not charged with domestic violence. CP 1-3. Even so, his lawyer did not object to testimony that his sister had red marks on her chest and neck that appeared fresh. RP 125, 163. Again, the state called a police witness who had not seen the alleged assaults simply to describe the marks and show photographs. RP 159-166.

Mr. Russell's defense attorney provided ineffective assistance of counsel by failing to object to this pervasive, inadmissible, highly-prejudicial evidence.

Counsel provides deficient performance by failing to object to inadmissible evidence absent a valid strategic reason. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (*citing State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)). Reversal is required if an objection would likely have been sustained and the result of the trial would have been different without the inadmissible evidence. *Id.*

Evidence of uncharged crimes or other bad acts is not admissible "to prove the character of a person in order to show action in conformity therewith." ER 404(b). Evidence is also inadmissible if its probative value is outweighed by the risk of unfair prejudice. ER 403.

When analyzing evidence of uncharged misconduct, a trial court must begin with the presumption that the evidence is inadmissible. *McCreven*, 170 Wn. App. at 458. The burden is on the state to overcome this presumption. *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2014).

Before admitting misconduct evidence, the court must find by a preponderance of the evidence that the misconduct actually occurred, identify a proper purpose for the evidence, determine its relevance to prove an element of the offense, and weigh the probative value against the prejudicial effect. *Slocum*, 183 Wn. App. at 448.

All of the steps outlined above must be performed on the record, and the court must resolve doubtful cases in favor of exclusion. *McCreven*, 170 Wn. App. at 458; *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

If Mr. Russell's attorney had objected to the evidence of his resisting arrest and of his sister's injuries, the court's analysis would have determined that it was inadmissible.

The evidence was not relevant to any element of Mr. Russell's assault charges.[6] Indeed, its only logical purpose was to make Mr.

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[6] The evidence was also not admissible as *res gestae* of the offenses with which Mr. Russell was charged. *Res gestae* or "same transaction" evidence can be admissible to

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Russell appear more violent and to encourage the jury to draw an impermissible propensity inference.[7]

Counsel had no valid tactical reason for permitting the evidence. Its admission made Mr. Russell appear more violent. A reasonable defense attorney would have objected. Mr. Russell's lawyer provided deficient performance by failing to do so. *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007).

Mr. Russell was prejudiced by his attorney's deficient performance. *Kyllo*, 166 Wn.2d at 862. Evidence of other bad acts is inadmissible precisely because the risk that the jury will draw an impermissible propensity inference is so high. Here, upon hearing the repeated testimony about Mr. Russell's lack of cooperation with the police after the alleged assaults and the evidence encouraging the jury to

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"complete the story of the crime." *State v. Mutchler*, 53 Wn. App. 898, 901, 771 P.2d 1168 (1989). Such evidence must compose "inseparable parts of the whole deed or criminal scheme." *Id.* *Res gestae* evidence involving other crimes or bad acts, however, must still meet the requirements of ER 404(b). *Id.*

As outlined herein, the evidence that Mr. Russell resisted arrest and that his sister had red marks on her body did not meet the other admissibility requirements of ER 404(b). The evidence was also not part of an inseparable whole. The prosecution witnesses could easily have told the story of the alleged assaults and then simply said that Mr. Russell was arrested.

[7] Evidence of resisting arrest is admissible only in cases in which it creates a direct inference of consciousness of guilt. *State v. McDaniel*, 155 Wn. App. 829, 855, 230 P.3d 245 (2010). The police witnesses claimed that Mr. Russell was uncooperative throughout the interaction – including before the alleged assaults. Accordingly, the evidence that he remained uncooperative after the alleged assaults does not evince evidence of guilt of the crimes with which he was charged. *Id.*

speculate that Mr. Russell had been involved in domestic violence, the jury likely assumed that Mr. Russell was more likely to have committed the alleged assaults.

There is a reasonable probability that counsel's unreasonable failure to object affected the outcome of Mr. Russell's trial. *Kyllo*, 166 Wn.2d at 862.

Mr. Russell's attorney provided ineffective assistance of counsel by failing to object to lengthy inadmissible evidence that made his client appear violent. *Id.; Hendrickson*, 138 Wn. App. at 833. Mr. Russell's convictions must be reversed. *Id.*

III. PROSECUTORIAL MISCONDUCT DENIED MR. RUSSELL HIS RIGHT TO A FAIR TRIAL.

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, Wash. Const. art. I, § 22. A conviction must be reversed where the misconduct prejudices the accused. *Id.* Even absent objection, reversal is required when misconduct is "so flagrant and ill intentioned that an instruction would not have cured the prejudice." *Glasmann*, 175 Wn.2d at 704.

To determine whether a prosecutor's misconduct warrants reversal, the court looks to its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight "not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office." Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

At Mr. Russell's trial, the prosecutor committed misconduct by appealing to the jury's passion and prejudice, bolstering police testimony with facts not in evidence, and minimizing the state's burden of proof.

A. The prosecutor committed misconduct by repeatedly appealing to the jury's passion and prejudice during closing argument.

During Mr. Russell's trial, the prosecutor argued that the jury should believe the police officers' version of events because they "go out there and risk their lives to defend people." RP 289.

He also admonished the jury that they should make Mr. Russell "suffer the consequences" of failing to cooperate with the police because "the consequences are real." RP 298.

Finally, the prosecutor told the jury that Mr. Russell was lucky that the interaction did not take place in the "old days" when "all the cop has is a billy club and a gun." RP 314.

The prosecutor committed misconduct by appealing to the jury's passion and prejudice rather than to logic and the strength of the evidence.

A prosecutor commits misconduct by making arguments designed to inflame the jury's passion and prejudice. *Glasmann*, 175 Wn.2d at 704.

A prosecutor also commits misconduct by arguing that the jury should "hold [the accused] accountable" for his alleged misdeeds. *State v. Neal,* 361 N.J. Super. 522, 537, 836 A.2d 723 (App. Div. 2003). Such arguments are akin to asking the jury to send a message, and thus "improperly divert jurors' attention from the facts of the case." *Id.*

It is also prosecutorial misconduct for a prosecutor to argue that the jury should return a guilty verdict in order to protect the community. *State v. Ramos*, 164 Wn. App. 327, 337, 263 P.3d 1268 (2011). Such improper arguments risk conviction "for reasons wholly irrelevant to the [accused's] own guilt or innocence. *Ramos*, 164 Wn. App. at 338 (*quoting United States v. Sollivan*, 937 F.2d 1146, 1153 (6th Cir. 1991)).

Here, the prosecutor's arguments "improperly divert[ed] attention from the facts" of Mr. Russell's case by repeatedly appealing to the jury's sense of duty toward the police rather than to the evidence in the case.

The argument that the jury should make Mr. Russell "suffer the consequences" was analogous to arguing that the jury should hold him accountable for his actions.

The prosecutor's tactic of setting the issue up as one of Mr. Russell who did not understand "real consequences" versus the police officers who were trying to protect the community appealed to the jury's passion and prejudice rather than to the strength of the evidence. The prosecutor's arguments were improper. *Glasmann*, 175 Wn.2d at 704; *Ramos*, 164 Wn. App. at 337.

There is a substantial likelihood that the prosecutor's improper arguments affected the outcome of Mr. Russell's trial. *Glasmann*, 175 Wn.2d at 704.

Mr. Russell's case pitted the credibility of the state's police witnesses against his lay witnesses. The prosecutor's arguments encouraged the jury to believe the state's witnesses simply because they were police officers. Mr. Russell was prejudiced by the prosecutor's misconduct. *Id.*

Misconduct is flagrant and ill-intentioned when it violates professional standards and case law that were available to the prosecutor at the time of the improper statement. *Glasmann*, 175 Wn.2d at 707.

Here, the prosecutor had access to long-standing case law and professional norms prohibiting appeals to passion and prejudice at the time that he made the arguments at Mr. Russell's trial. *See Glasmann*, 175 Wn.2d at 706; *Ramos*, 164 Wn. App. at 338; Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8.

Arguments with an "inflammatory effect on the jury" are also generally not curable by an instruction. *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012).

The prosecutor's misconduct at Mr. Russell's trial was flagrant and ill-intentioned. *Id.*; *Glasmann*, 175 Wn.2d at 708. It could not have been cured by an instruction. *Glasmann*, 175 Wn.2d at 708.

The prosecutor committed misconduct at Mr. Russell's trial by repeatedly appealing to the jury's passion and prejudice during argument. *Glasmann*, 175 Wn.2d at 704; *Ramos*, 164 Wn. App. at 337. Mr. Russell's convictions must be reversed. *Id.*

B. The prosecutor committed misconduct by attempting to bolster the credibility of the state's police witnesses based on facts not in evidence.

In closing at Mr. Russell's trial, the prosecutor told the jury that they should believe the state's witnesses because "the police don't make this stuff up." RP 292. He argued that the police officers would "risk

their careers, their badges, and their pensions" if they had pepper sprayed Mr. Russell without provocation. RP 288.

The prosecutors committed misconduct by vouching for the police witnesses and bolstering their testimony with "facts" not in evidence.

A prosecutor commits misconduct by arguing "facts" that have not been admitted into evidence. *State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008). It is also misconduct for a prosecutor to attempt to bolster the credibility of a state witness or to personally vouch for a witness. *Id.*; *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010).

It follows that a prosecutor may not argue to the jury that police witnesses are more credible than others because they would risk professional sanctions by lying or making on-the-job mistakes, particularly when there is no evidence to support those arguments. *Jones*, 144 Wn. App. 284-85.

Here, the prosecutor improperly vouched for the police witnesses by telling the jury that the police "do not make this stuff up." *Ish*, 170 Wn.2d at 196. He also attempted to bolster their testimony with "facts" not in evidence by referring to professional sanctions they would face if

they used force against Mr. Russell without justification.[8] *Jones*, 144 Wn. App. 284-85.

Mr. Russell was prejudiced by the prosecutor's improper arguments. *Glasmann*, 175 Wn.2d at 704.

As argued above, this case pitted the credibility of the state's police witnesses against that of Mr. Russell and his other lay witnesses. The prosecutor argued that the jury should believe the state's witnesses just because they were police officers, rather than truly weighing the evidence on both sides. There is a substantial likelihood that the prosecutor's misconduct affected the outcome of Mr. Russell's trial. *Id.*

Again, the prosecutor had access to long-standing case law prohibiting the exact type of argument that the prosecutor made at Mr. Russell's trial. *See Jones*, 144 Wn. App. 284-85. The prosecutor's improper arguments were flagrant and ill-intentioned. *Glasmann*, 175 Wn.2d at 707.

The argument was also not curable by an instruction because it had an "inflammatory effect on the jury." *Pierce*, 169 Wn. App. at 552.

The prosecutor committed misconduct at Mr. Russell's trial by vouching for the state's witnesses and attempting to bolster their

[8] Once officer witness testified that he would face consequences at work if he forced entry into a home without cause, but no witness discussed the possible consequences of using force without good reason. RP 249.

credibility with "facts" not in evidence. *Ish*, 170 Wn.2d at 196; *Jones*, 144 Wn. App. 284-85. Mr. Russell's convictions must be reversed. *Id.*

C. The prosecutor committed misconduct by minimizing the state's burden of proof.

At Mr. Russell's trial, the prosecutor argued to the jury that they had "an abiding belief" in Mr. Russell's guilt if they believed he was guilty both during deliberations and (a few minutes later) when they announced the verdict in the courtroom. RP 293.

But an abiding belief must endure much longer than a few minutes. *See State v. Osman*, 192 Wn. App. 355, 375, 366 P.3d 956 (2016).

The prosecutor committed misconduct by mischaracterizing and minimizing the state's burden of proof during closing argument.

A prosecutor commits misconduct by minimizing the state's burden of proof to the jury. *State v. Johnson*, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010) *review denied,* 171 Wn.2d 1013, 249 P.3d 1029 (2011).

A prosecutor's misstatement of the state's burden of proof "constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights." *Johnson*, 158 Wn. App. at 685-86.

Here, the jury was properly instruction that they were satisfied beyond a reasonable doubt if they had "an abiding belief in the truth of the charge[s]" against Mr. Russell. CP 50.

An "abiding belief" is accurately described as one that endures for months or years. *Osman*, 192 Wn. App. at 377.

But the prosecutor at Mr. Russell's trial told the jury that it could last mere minutes:

> You have an abiding belief. Do you believe it now, you go back there and you talk about it, you come back here and announce your verdict and you still believe it.
> RP 293.

The prosecutor committed misconduct by mischaracterizing and minimizing the state's burden of proof to the jury. *Johnson*, 158 Wn. App. at 685-86.

There is a substantial likelihood that the prosecutor's improper arguments affected the outcome of Mr. Russell's trial. *Glasmann*, 175 Wn.2d at 704. As outlined above, the evidence against Mr. Russell was far from overwhelming for at least one count. Especially in the context of the prosecutor's other improper arguments, the jury could have convicted Mr. Russell because it felt a duty to believe the police witnesses and because it misunderstood the gravity of the state's burden of proof. Mr. Russell was prejudiced by the prosecutor's misconduct. *Id.*

Once again, the prosecutor had access to long-standing case law prohibiting arguments that minimize the state's burden of proof. *See e.g. Johnson*, 158 Wn. App. at 685-86. The prosecutor's improper arguments were flagrant and ill-intentioned. *Glasmann*, 175 Wn.2d at 707.

The prosecutor committed misconduct by mischaracterizing and minimizing the state's burden of proof to the jury. *Johnson*, 158 Wn. App. at 685-86. Mr. Russell's convictions must be reversed. *Id.*

D. The cumulative effect of the prosecutor's repeated misconduct requires reversal of Mr. Russell's convictions.

The cumulative effect of repeated instances of prosecutorial misconduct can be "so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011), *as amended* (Nov. 18, 2011), *review granted, cause remanded*, 175 Wn.2d 1022, 295 P.3d 728 (2012).

The prosecutor committed extensive misconduct at Mr. Russell's trial by appealing to the jury's passion and prejudice, minimizing the state's burden of proof, and bolstering the officers' testimony with facts not in evidence. RP 288-289, 292-293, 298, 314.

Whether considered individually or in the aggregate, the prosecutor's improper arguments require reversal of Mr. Russell's convictions. *Walker*, 164 Wn. App. at 737.

IV. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD DECLINE TO IMPOSE APPELLATE COSTS ON MR. RUSSELL, WHO IS INDIGENT.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3 612 (2016).[9]

Appellate costs are "indisputably" discretionary in nature. *Sinclair*, 192 Wn. App. at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court's discretionary decisions on appellate costs. *State v. Blazina,* 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court found Mr. Russell indigent at both the beginning the end of the proceedings in superior court. CP 6, 75. That status is unlikely to change. Mr. Russell also receives mean-tested public benefits, which qualifies him as indigent under GR 34. CP 72. The *Blazina* court indicated that courts should "seriously question" the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839

[9] Division II's commissioner has indicated that Division II will follow *Sinclair.*

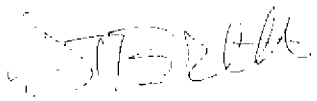
If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

CONCLUSION

No rational jury could have found beyond a reasonable doubt that Mr. Russell intentionally assaulted Green. Mr. Russell's defense attorney provided ineffective assistance of counsel by failing to object to extensive, prejudicial, inadmissible evidence and by proposing an erroneous jury instruction on defense of others. The prosecutor committed misconduct by appealing to the jury's passion and prejudice, vouching for and attempting to bolster the credibility of the police witnesses with facts not in evidence, and minimizing the state's burden of proof. Mr. Russell's convictions must be reversed.

In the alternative, if the state substantially prevails on appeal, this court should decline to impose appellate costs on Mr. Russell who is indigent.

Respectfully submitted on November 23, 2016,



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on November 23, 2016.

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Attorney for Appellant

ELLNER LAW OFFICE

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